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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 946

JAMES T. YSZARA,

Petitioner,

versus

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, James T. Yszara, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on February 25, 1959.

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Tr.), which is printed in Appendix A hereto, *infra*, page 13, is reported in 263 Fed. 2d 937.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 25, 1959 (Tr. 101; Appendix B, *infra*, page 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED

Whether the Court of Appeals in reversing the trial court's judgment for the plaintiff and rendering judgment for the defendant in a diversity action, usurped the province of the jury in violation of the Seventh Amendment to the Constitution of the United States and contrary to the decisions of this Court by weighing the evidence on the issues of negligence and proximate cause and disregarding the jury verdict resolving these issues in favor of petitioner.

IV.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States which provides as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Rules of Decision Act, 28 U.S.C. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or

Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

V.

STATEMENT

Petitioner, James T. Yszara, brought this suit under the Louisiana Direct Action Statute, La. R.S. 22:655, against Respondent, State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, seeking damages resulting from a highway collision between a truck driven by Petitioner and a passenger car driven by Respondent's insured (Tr. 1-5). The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Louisiana and the defendant being a foreign corporation domiciled at Bloomington, Illinois, and authorized to and doing business in the State of Louisiana (Tr. 2, 6).

Plaintiff alleged that while he was driving his truck in a southerly direction on Louisiana Highway 48, a Ford Ranch Wagon was driven by Mrs. Clara H. Baston, defendant's insured, from a driveway into the highway in such a manner that the right front portion of the station wagon struck the right side of plaintiff's truck, causing the truck to overturn and seriously injuring plaintiff. Defendant admitted it was the insurer of Mrs. Baston, but denied that she was guilty of any negligence in the operation of the station wagon. Defendant affirmatively alleged that the accident resulted solely through the negligence of plaintiff, who permitted the truck which he was driving to leave the paved portion of the highway and to collide with the automobile occupied by Mrs. Baston while the latter vehicle was in a stopped position in a drive-

way off the highway. In the alternative, defendant specially pleaded contributory negligence on the part of plaintiff as a bar to recovery.

The case came on for hearing and was tried to a jury. Petitioner, James T. Yszara, was the sole witness for the plaintiff with regard to the facts of the accident. He testified substantially that on March 12, 1956, a clear dry day, at approximately 8:30 a.m. he was alone, driving his dump truck in a southerly direction upon the twenty-foot wide asphalt highway at a speed of forty or forty-five miles per hour in a forty-five mile an hour speed zone (Tr. 27, 28). Seeing nothing ahead of him on the highway, he looked briefly off to the side of the road (Tr. 29, 39). When he looked back in front of him a car was slowly entering the highway from a driveway on the west or right side of Highway 48. In an attempt to avoid colliding with the vehicle, he swerved sharply to the left, but the **right** rear dual wheels of his truck struck the **right** front end of the car (Tr. 29, 30). Plaintiff testified that he did evertyhing he could to avoid hitting the automobile and that as far as he knew his truck never left the highway on the right side of the road prior to the collision (Tr. 37, 40-42). Plaintiff further testified that he believed the **station wagon was moving** at the time of the accident, but that he did not know whether the wheels of that car were on the asphalt portion of the highway. He testified positively, however, that the car was **on an angle** relative to the highway, that its right side was turned toward the asphalt road, and that the portion between the bumper and grill had entered his lane of traffic (Tr. 29, 43, 44, 47-51, 53, 59, 60).

Mrs. Baston, defendant's insured, testified that she had entered the driveway to turn around and as she

headed back to the highway, she intended to make a left turn and to drive north on Highway 48 to pick up a child, Catherine Goolsby, who was awaiting a ride to school (Tr. 69). She stated that her car was **stopped,** that it was oriented **at right angles** or perpendicular **to the highway** (Tr. 90). She also stated that she knew that its wheels were not on the asphalt portion of the highway, but as far as the overhang and the length of the car were concerned, she felt that **her car was off the highway** (Tr. 76). She further testified that she saw the truck approaching and that just opposite the point where Catherine Goolsby was standing (approximately 150 feet north of the point of collision), the truck ran completely off the asphalt on the west shoulder of the road (Tr. 72, 74); that when the truck came within a few feet of her car, the driver cut sharply to his left (Tr. 72); and that the rear wheels of his truck struck her automobile. She positively testified that the collision caused plaintiff's truck to fly high in the air—end over end—for a distance of 150 feet (Tr. 73, 77-83), but did not substantially move her automobile, which remained in approximately the same position after the accident as it was prior thereto.*

Two children also testified for the defendant. Catherine Goolsby, age 13, testified that she saw plaintiff's truck; that when it passed her it was **on the highway** (Tr. 99); that it thereafter left the paved portion of the highway and struck Mrs. Baston's car (Tr. 99). She also testified that at the time of the accident the Baston car was **parked a few feet from the asphalt** portion of the highway and further back than was shown in the photographs which were admitted in evidence (Tr. 99,

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* See exhibit No. , which shows the automobile protruding into the highway at least a couple of feet.

100). Jimmy Cook, age 14, testified that he did not think the Baston car was protruding into the highway, but that he did not know of his own knowledge whether or not it was (Tr. 111, 112).

Upon this and other evidence adduced at the trial—including photographs offered by the defendant indicating the general locale of the accident and the relative positions of the vehicles after the collision—the jury returned a verdict for plaintiff in the sum of $7,500.00. The District Court, having heard the evidence and seen the witnesses, denied the defendant's motion for judgment notwithstanding the verdict of the jury, and in the alternative, for a new trial, and thereupon entered judgment on the verdict for the plaintiff.

From the District Court's judgment, State Farm Mutual Automobile Insurance Company brought its appeal to the Court of Appeals for the Fifth Circuit. That Court, disregarding the jury's findings and assuming that Mrs. Baston's "bumper and headlight had, coming out in slow motion, reached the highway", held that the plaintiff "in driving at such a rate of speed that he could not stop and avoid a collision within the range of his vision, was guilty of negligence." The Court of Appeals thereupon reversed the District Court's judgment and rendered judgment for the Respondent.

VI.

REASONS FOR GRANTING THE WRIT

1. ***The action of the Court of Appeals is not in accord with the applicable decisions of this Court.***

In *Ellis v. Union Pacific R. Co.*, 329 U.S. 649, 653 (1946), this Court said:

"The choice of conflicting versions of the way the

> accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from the uncontroverted as well as controverted facts, are questions for the jury."

Nevertheless, the Court of Appeals, without reference to the photographs and other evidence in the record, isolated a bit of plaintiff's testimony and from it inferred that the entry of Mrs. Baston's automobile from a private driveway and into the path of Peitioner's truck on a main highway should, as a matter of law, have been foreseen by Petitioner. From this substitution of the appellate court's judgment for that of the jury, it held that Petitioner was negligent as a matter of law in not so driving his truck that he could avoid striking the offending automobile.

Upon evidence from which reasonable, fair-minded men might draw different inferences, the issues of negligence and proximate cause were properly left to the jury to decide and the appellate court below had no authority to re-draw the inferences, substituting its interpretation of the facts for that of the jury. *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944).

2. The action of the Court of Appeals constituted an invasion of the province of the jury, contrary to the Seventh Amendment to the Constitution of the United States.

The right on which petitioner's case depends is the prohibition against free-wheeling appellate review which is specified in the Seventh Amendment and the Supreme Court of the United States is the only tribunal which can ultimately enforce that right. As this Court said in *Tennant v. Peoria & P. U. Ry. Co., supra*, at p. 35, there

is no reason why this Court should abdicate its "duty to protect and guard that right."

On numerous occasions this Court has viewed with disfavor the action of appellate courts which exhibits a marked indifference to the findings and function of a jury, and in consideration of sound judicial policy has granted writs of certiorari in such cases. See recent cases from the United States Court of Appeals for the Fifth Circuit: *Anderson v. Atlantic Coast Line R. Co.*, 350 U.S. 807 (1955); *Swafford v. Atlantic Coast Line R. Co.*, 350 U.S. 807 (1955); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956); *Thompson v. T. & P. Ry. Co.*, 352 U.S. 926 (1957). See also, *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956), and cases cited in 352 U.S. 549 ff. (1957).

The facts of this case present such a situation. The conflicting evidence clearly raised the factual issues of whether or not plaintiff was operating his vehicle at an unreasonable rate of speed, whether he failed to maintain a proper lookout, whether the Baston automobile was moving into the highway and into the path of the oncoming truck, and whether under all the circumstances plaintiff exercised that degree of ordinary care and prudence which was required of him under Louisiana law. The jury was clearly charged as to these issues and the court's instructions were unobjected to by the defendant. The jury resolved each of these factual issues in plaintiff's favor. The verdict was fortified by the denial of all motions directed against the verdict. Yet, the court below saw fit to substitute its own conclusions for those of the jury. In denying to petitioner his right to a jury finding of facts, the decision conflicts with the commands of this Court and therefore "special and important reasons" for the granting of certiorari exists.

3. *The writ should be granted in the exercise of this Court's power to afford proper supervision of the Federal judiciary and to correct plain error.*

The Louisiana decision relied upon by the Court of Appeals* and the cases cited in *Louisiana Power and Light Co. v. Saia*, 188 La. 358, 177 So. 238 (1937),** (which explains the rule that motorists are negligent as a matter of law when they "drive an automobile along the highway at such a speed that it cannot be stopped in time to avoid an obstruction discernible within the range of vision ahead") uniformly apply only to accidents which occur during the nighttime or where there is heavy fog which obstructs a motorist's vision. These cases and the rule of law which they clearly and correctly state have no relevance to the question whether it is foreseeable to a motorist on a highway that a vehicle approaching the highway from a private driveway will, contrary to law and common sense, enter that highway in the path of an oncoming truck. In the instant case, the Court of Appeals emphasized the fact that the station wagon was "coming out 'in slow motion down to the highway'", but by its holding arbitrarily

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* Cases cited by Court of Appeals: *Smith v. Fed. Mutual Insurance Co.*, 206 F. 2d 549 (1953) (nighttime); *Louisiana Power & Light Co. v. Saia*, 188 La. 358, 177 So. 238 (1937) (nighttime); *Shell Oil Co. Inc. v. Slade*, 133 F. 2d 518 (1943) (fog); *Booth v. Home Indemnity Co.*, 244 F. 2d 568 (1957) (high speed).

** In *Louisiana Power and Light Co. v. Saia*, 188 La. 358, 361 (1937), the Louisiana Supreme Court quoted from Act No. 21 of 1932 which requires vehicles operating on public highways after dark to be equipped with burning headlights of prescribed strength, said "**In applying this provision of the statute,** the courts have concluded that a motorist is held to have seen an object which, by the use of ordinary care and prudence, he should have seen in time to avoid running into it, and that the driver of an automobile is guilty of negligence in driving at a rate of speed greater than that in which he could stop within the range of his vision." (Emphasis supplied) The court then cited the following cases: *O'Rourke v. McConaughey* (La App.) 167 So. 598-606 (fog); *Sexton v. Stiles*, 15 La. App. 148, 130 So. 821 (darkness); *Blahut v. McCahil* (La. App.) 163 So. 195 (darkness); *Goodwin v. Theriot* (La. App.) 165 So. 342 (nighttime); *Waters et al. v. Meriwether Transfer Co.*, 18 La. App. 18, 137 So. 578 (nighttime).

ruled out the reasonable inference which a jury could have drawn, that is, that the slow movement was an indication that the driver was slowing down to stop and to allow the truck to pass before she entered the highway. By the court's reasoning, the station wagon's movement "in slow motion down to the highway" should, as a matter of law, have been a warning to the plaintiff—no matter how far away he was from the intersection of the driveway and the highway—that the driver of the station wagon would ignore the requirement of law that she "yield the right of way to all vehicles approaching on the public highway." (Tr. 137)

If the rule of the decision below is allowed to stand, this issue of foreseeability which is a jury question in the state courts, will be a question of law in the federal courts and thus violate the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act, 28 U.S.C. § 1652.

CONCLUSION

For the foregoing reasons and in the exercise of this Court's power to afford proper supervision of the Federal judiciary and to correct plain error, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARY ELLEN CALDWELL,
3514 Marie Drive,
Baton Rouge, Louisiana,

JOSEPH A. SIMS,
Box 392,
Hammond, Louisiana,
Counsel for Petitioner.

FORM FOR PROOF OF SERVICE

I, Mary Ellen Caldwell, one of the attorneys for James T. Yszara, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 19 ..., I served copies of the foregoing Petition for a Writ of Certiorari on the Respondent hereto, as follows:

(By mailing a copy, in a duly addressed envelope, with first class postage prepaid, to F. Carter Johnson, Jr., Esq., American Bank Bldg., New Orleans, Louisiana.)

(Signed) .....
Attorney for James T. Yszara

Address .....

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17446

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant,

versus

JAMES T. YSZARA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 25, 1959.)

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: Brought by plaintiff under the Louisiana Direct Action Statute against the public liability insurer of Mrs. Baston, the suit was for damages resulting from a highway collision between a truck driven by plaintiff and a passenger car driven by defendant's insured.

As testified to by the plaintiff, his sole witness, his claim was: that as he was coming down the right side of the blacktop on Jefferson Highway in a southerly direction, going at a speed between forty and forty-five

miles an hour, with about a thousand feet or better of clear highway in front of him, he looked to the side of the road; that when he turned his head back and he was right on it, fifteen or twenty feet away, he saw the car driven by Mrs. Baston coming out of the driveway *"in slow motion down to the highway"*; that at that time he was so close to it that he had to dodge it with the front end of the truck and, in doing so, the back wheels hit a part of the front end of the car and turned him over; and that that was the last he could remember. He also testified that he did not know whether Mrs. Baston's car was stopped or moving when it was struck.

The defense was a denial that Mrs. Baston was guilty of any negligence and a claim that the collision resulted solely by and through the negligence of plaintiff, and that if there was negligence on her part, the collision was due to his contributory negligence.

Tried to the jury, the evidence for plaintiff consisted of plaintiff's testimony in substance as above stated, while that of the defendant, Mrs. Baston, who was taking several children to school that morning and one of the children who was waiting to get into her car, was that she was not on the highway but was stopped in the driveway waiting for the truck to pass, and that the truck went off of the blacktop and onto the shoulder and struck her car.

The court deferring decision on the motion until after the verdict, the case went to the jury, and there was a verdict for plaintiff.

Defendant's motions for judgment in accordance with its motion for a directed verdict and, in the alternative, for a new trial denied, a judgment for plaintiff was entered on the verdict.

Appealing therefrom, defendant is here insisting that, as matter of law, upon plaintiff's own testimony and under the controlling cases,[1] (a) no actionable negligence on the part of defendant was shown, and (b) if there was, plaintiff was guilty of such negligence as barred his recovery, and a verdict should have been directed for defendant.

Agreeing that this is so, we accept for the purpose of the demonstration that the jury found that the matter occurred just as plaintiff said that it did, though the speaking facts of the collision seem strongly to support the testimony of Mrs. Baston, that her car was stopped in the driveway, and that the truck came off the blacktop and onto the shoulder and struck it.

In plaintiff's statement, set out in substance hereinabove, it appears that, though he had 1000 feet of clear road with nothing in front of him or behind him, which interfered with his driving or prevented him from seeing what lay ahead, he, for a reason not stated, instead of paying attention to the road and where he was going, looked off to the side and, when he turned his attention to the road, he suddenly noticed that fifteen or twenty feet in front of him the car was coming out "in slow motion down to the highway", and, undertaking to dodge it, he collided with it. Assuming as correct that his testimony that, at the time he dodged, Mrs. Baston's bumper and headlight had, coming out in slow motion, reached the highway and that this was negligence on her part, this would not avail him. For, under settled law in Louisiana and elsewhere, a motorist is held to have

[1] Texas & Pacific v. LaBorde, 257 F(2) 597; Booth v. Home Indemn. Co., 244 F(2) 568; Brinson v. Ill. Central R.R., 241 F(2) 494; Great Am. Indemn. Co. v. Cormier, et al, 187 F(2) 107; Missouri Pacific R.R. Co. v. Fusilier, 256 F(2) 278; Piland v. Maryland Cas. Co., 179 F(2)678; Smith v. Fid. Mut. Ins. Co., 206 F(2) 549.

seen an object which, by the use of ordinary care and prudence, he should have seen in time to avoid running into it and under ordinary circumstances, such as prevailed here, the plaintiff, in driving at such a rate of speed that he could not stop and avoid a collision within the range of his vision, was guilty of negligence.

In *Smith v. Fed. Mutual Insurance Co.*, 206 F(2) 549, (5 Cir.), a case very much in point here, the court said:

> "There have been a great many cases in which this and other courts have considered and discussed facts similar to those which are here present, and in all of them it has been held that it is negligence as a matter of law for motorists to drive an automobile along the highway at such a speed that it cannot be stopped in time to avoid an obstruction discernible within the range of vision ahead. Louisiana Power & Light Co. v. Saia, 188 La. 358, 177 So. 238; Shell Oil Co., Inc. v. Slade, 5 Cir., 133 F(2) 518."

In *Booth v. Home Indemnity Co.*, 244 F(2) 568 and other similar cases the same principle has been reaffirmed.

REVERSED and RENDERED.

JUDGMENT

Extract from the Minutes of February 25, 1959

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

No. 17,446 versus

JAMES T. YSZARA

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and here rendered for appellant, State Farm Mutual Automobile Insurance Company;

It is further ordered and adjudged that the appellee, James T. Yszara, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX B

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action
No. 5831

JAMES T. YSZARA

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

JUDGMENT

By reason of the verdict of the jury rendered herein, and in accordance therewith:

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that judgment be and is hereby entered in favor of Plaintiff, James T. Yszara, and against the Defendant, State Farm Mutual Automobile Insurance Company, in the full and true sum of Seven Thousand Five Hundred and no/100 ($7,500.00) Dollars together with legal interest and costs.

s/ Herbert W. Christenberry
JUDGE